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IN THE

United States Supreme Court

OCTOBER TERM 1967

No. 963

MARIAN FORD STUCKER,

Petitioner,

v.

THE COLLEGE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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THE COLLEGE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, Marian Ford Stucker, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-captioned case on October 13, 1966.

OPINION BELOW

The trial court entered a judgment on the 8th of January, 1962, printed herein at pp. 1a as Appendix A. The Indiana Appellate Court rendered judgment affirming the trial court and entered an opinion on the 7th of July, 1965, which is printed herein at pp. 3a as Appendix B and is reported at 208 N. E. 2d. 731. The Indiana Appellate Court denied the Petition for Rehearing on November 8th, 1965, which is printed in part herein at pp. 23a as Appendix C and is reported at 211 N. E. 2d 320. The Indiana Supreme Court denied the petition to Transfer on October 13, 1966, without opinion by docket entry.

JURISDICTION

The Indiana Appellate Court entered its opinion affirming the Judgment of the trial court on July 7th, 1965. A timely Petition for Rehearing was filed on July 27th, 1965. On November 8th, 1965, the Petition for Rehearing was denied. On November 24, 1965, a timely Petition to Transfer was filed in the Indiana Supreme Court. On October 13, 1966, the Petition for Transfer was denied without opinion by docket entry. This Petition for Certiorari is filed within 90 days of that denial. The specific federal questions now presented by this Petition for Certiorari were first raised in the trial court in the pleading stage of this action and are more fully explained in the statement which follows:

Accordingly, a final judgment subject to review by this court has been entered.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

The federal questions raised in this appeal are:

1. Whether the Indiana Courts violated the dictates of the full faith and credit clause of the United States Constitution, U.S. Const. Art. IV, Sec. 1, by failing to apply the law of the State of Colorado for the purpose of determining whether or not Petitioner had stated a good cause of action for recovery in her complaint.

2. Whether the Korean Conflict was a "war" within the Constitutional meaning of war as defined under Article IV, section 8, of the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioner's claim is founded on Article IV, section 1, the Full Faith and Credit clause of the Constitution of the United States, which reads:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State . . ."

and Article I, section 8, the war clause of the Constitution of the United States, which reads:

> "The Congress shall have Power . . .
> "To declare war . . ."

STATUTES

Colorado Rev. Stat. Ann., Vol. 3, Ch. 72, Art. 3.

STATEMENT OF CASE

On March 15, 1951, Lyle D. Stucker purchased from the College Life Insurance Company of America a policy

of life insurance on his life containing provisions for payment of $10,000.00 in the event of his death and $20,000.00 in the event of his death by accidental means. The proceeds of this policy were to be paid to a beneficiary selected and designated by Lyle D. Stucker. After the death of Lyle D. Stucker, the named beneficiary, wife of the insured, Marian Ford Stucker, brought an action, on May 18, 1954, in the Marion Superior Court, Room No. 1, State of Indiana, seeking recovery for both the benefits under the ordinary life provisions and double indemnity provisions provided in the said policy of life insurance. The College Life Insurance Company of America is now and was a corporation duly incorporated under the laws of the State of Indiana. Lyle D. Stucker was a resident of the State of Colorado, and said policy of insurance was issued and the contract was executed in the State of Colorado. Marian Ford Stucker, the wife of the insured and beneficiary under said policy, is now and has been a resident of the State of Colorado. After four amended complaints, the fourth having been further amended by interlineation, the College Life Insurance Company of America filed a demurrer on the grounds and for the reason that the petitioner in this action failed to state facts sufficient to constitute a cause of action. The basis of the respondent's demurrer was a "war risk" exclusion clause contained in said policy. The trial court sustained the respondent's demurrer, and thereafter entered judgment against petitioner. The Appellate Court of Indiana affirmed the judgment of the lower court and the Supreme Court of Indiana denied petitioner's Petition to Transfer the case.

In her complaint, Marian Ford Stucker alleged her husband, the insured, died from bullet wounds received in the Country of Korea.

Clause three of Count I of the petitioner's fourth amended complaint as further amended by interlineation stated:

> That the beneficiary of said policy is designated as his wife, Marian Ford Stucker. That thereafter on the 16th day of October, 1952, the said Lyle D. Stucker died in Korea as a result of bullet wounds received in the Country of Korea while in the service of the United Nations. The exact place and time being unknown to the plaintiff. Plaintiff is unable to allege with any greater particularity the place decedent received the fatal bullet wounds, by whom inflicted, or under what circumstances same were received. (R49)

Clause five of Count II of petitioner's fourth amended complaint as further amended by interlineation stated:

> That on or about the 16th day of October, 1956, while said policy was in full force and effect, and while the Double Indemnity Provision for accidental death benefit was also in full force and effect, which said Double Indemnity Provision is hereinbefore set out, and all premiums due on said policy on the Double Indemnity Provision thereof were fully paid, the said Lyle D. Stucker sustained bodily injuries affected directly to accidental violent and external means while engaged in the Korean Action in the Country of Korea, and from which injuries, he died in Korea on the 10th day of October, 1952." (R35)

The trial court on the 8th day of January, 1962 entered a judgment for the Respondent subsequent to the Petitioner's refusal to plead over. (Appendix A pp. 1a) The foundation of the Respondent's demurrer that the Petitioner failed to state facts sufficient to constitute a cause of action was that the "war risk" exclusion provisions contained in the policy of insurance precluded recovery of the ordinary benefits and the Double Indemnity benefits as provided for in the policy. The clause con-

tained in the policy and relied on by the respondent in their demurrer to the petitioner's demand for the ordinary benefits stated:

"If the death of the Insured

(1) Results from injury received or disease contracted outside the Home Area as a result of War, while the Insured is in war service or within six months after termination of such service; or.....

the amount payable to the beneficiary under this policy shall be a single sum equal to the premiums actually paid on this policy less any dividends returned, with compound interest at the rate of three per cent per annum, less any indebtedness on the policy; however, the amount so paid shall not be more than would be payable in the absence of this aviation and war risk provision, nor less than the valuation reserve on the life insurance benefit in this policy and on any dividend additions plus the value of any dividend deposits and less any indebtedness on the policy.

"'Home area' means the forty-eight states of the United States, the District of Columbia, the Dominion of Canada, the Territory of Hawaii and the Territory of Alaska. 'War' means war, or any act of war, declared or undeclared. 'War service' means being in the military, naval, or air forces of any country, or international organization, at war, declared or undeclared." (R53)

The clause contained in the policy and relied on by the Respondent in their demurrer to the Petitioner's demand for the Double Indemnity benefit stated:

"This Double Indemnity Benefit shall not apply if the Insured's death

(1) occurs while in the military, naval, or air forces of any country at war, declared or undeclared; or,

(2) is caused or contributed to by war." (R55)

The Petitioner in her "Memorandum in Opposition to Defendant's Demurrer to Count I and Count II of Plaintiff's Fourth Amended Complaint filed the 2nd day of June, 1961, stated that, "Before Korean Action can be considered legally as a war within the meaning of the Constitution of the United States it must be recognized and declared as a war by the Congress of the United States. No power short of this can alter the legal status of the government or the relations of its citizens from that of peace to a state of war. The Constitution of the United States pertinent here reads:"

> 'Article 1, Section 8, Congress shall have power to . . . declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces.' (R63)

In addition to raising the question of the Constitutional definition of war the Petitioner further pointed out to the Indiana trial court the holding of the Supreme Court of Colorado, the state where the contract was executed, in the case of *Pyramid Life Ins. Co. v. Masch* 134 Colo. 70, 299 P.2d 117, (1956) quoting in part from that decision and restated here

> "We are asked to take judicial notice that the engagements of United States troops in Korea constitutes "war"; this, in spite of the fact, as counsel for the defendant admit that "war" was never declared by Congress, the only authority competent to declare it, with respect to the action Korea. The existence or nonexistence of a state of war is a political, not a judicial question and it is only when a formal declaration of war had been made by the Congress that judi-

cial cognizance may be taken thereof. Once so declared by the political department, it becomes binding upon the courts otherwise not." (R65)

The Petitioner also set forth in her memorandum in Opposition to Defendant's Demurrer that:

> "War," according to the law of nations, the United States Constitution, the State of Colorado, the State of Indiana, and the State of Pennsylvania having a meaning of "declared War," then "war Service" can only mean, legally speaking, declared war service. So, too, an act of war means in legal connotation an act of declared war. Again, citing the 1956 Colorado case of Pyramid Life vs. Masch, supra, Court declares at page 119,
>
> 'Any doubt concerning the meaning of a word or clause in a life insurance policy should be resolved in the favor of the Insured. Had the defendant decided to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'hostilities', whether or not declared by Congress to be a state of war.' (R66)

Contending that she had stated facts sufficient in her complaint to constitute a cause of action the Petitioner pointed out to the court that:

> If the Court choose to abandon the Constitutional meaning of war, the meaning of war by case law in the State of Indiana since 1871, and the meaning of war in the State of Colorado by case law reasserted in 1956, it at once opens the avenue of ambiguity. However, it is a general rule of law as previously pointed out that ambiguities in insurance policies should be construed against the insurrer. It is therefore, quite clear that the plaintiff has stated a cause of action and if the defendant desired to raise issues of fact he should set forth such facts in his answer. (R68)

A change of venue was then filed by the Petitioner in the Marion Superior Court of the State of Indiana on the 5th day of June, 1961 (R70). The change was granted on the 5th day of June, 1961 (R70), and the case was transferred to the Morgan Circuit Court of the State of Indiana on the 24th day of August, 1961 (R71). On November 8, 1961, the Petitioner filed in the Morgan Circuit Court a Motion to Reconsider Sustaining of Defendant's Demurrer to Count I and Count II of Plaintiff's Fourth Amended Complaint and memorandum (R74). The court overruled the Petitioner's Motion to Reconsider on the 11th of December, 1961 and ruled the Petitioner to file a fifth amended complaint on or before the 23rd of December or suffer default (R101). On the 8th of January, 1962, judgment was entered against the Petitioner (Appendix A. pp. 2a).

Petitioner appealed to Indiana Appellate court assigning as error: 1) the sustaining of the Respondent's demurrer to the Petitioner's fourth amended complaint and 2) the overruling of the Petitioner's motion to reconsider the sustaining of the Respondent's demurrer to the amended complaint. On the 7th of July, 1965, the Indiana Appellate Court affirmed the Judgment of the trial court. (Appendix B, pp. 3a).

In the opinion of the Indiana Appellate court the Constitutional issue arising under the "full faith and credit clause" of the Constitution of the United States was clearly recognized inasmuch as the court stated:

> At the outset of argument, appellant urges that the "Law of Colorado" should govern the obligations of appellee with respect to the insurance policy here involved. It appears from the application for the insurance, executed by the insured, that it was dated March

> 15, 1951, and gave his residence as Box 412, Delta (Delta County) Colorado, and his school address as 714 Remington, Ft. Collins, Colorado ...
>
> The policy states that it was issued on March 15, 1951, the same date as that of the application. We conclude, therefore, that the policy was made in the State of Colorado, as appellant claims. Such claim is not contested by appellee in its brief. The parties differ, however, on the question of whether the law of Colorado governs the obligation of appellee under the policy. (Appendix B, pp. 7a-8a)

Even though the Indiana Appellate Court recognized the significance of Colorado law the court declined to apply it in deciding the question presented on appeal. On page ten of the appellate court's opinion, the court stated:

> In the light of the distinction of the clauses in the decisions cited by appellant and the clause in the present policy, and further considering the reference made in the *Pyramid* and *Beley* cases to possible words of explanation, we feel those cases cited by the appellant and specifically the *Pyramid* case, are not controlling in the case at bar. (Appendix B, pp. 11a)

On the 27th of July, 1965, the Petitioner petitioned the Indiana Appellate Court for rehearing. This petition for rehearing was denied on the 8th of November, 1965. (Appendix C, pp. 23a) The Petitioner then petitioned to the Supreme Court of Indiana requesting transfer on the 24th of November, 1965. On the 13th of October, 1966, the Supreme Court of Indiana denied the Petitioner's petition to transfer.

ARGUMENT

I.

THE STATUTES AND CASE LAW OF THE STATE OF COLORADO SHOULD BE GIVEN FULL FAITH AND CREDIT BY THE STATE OF INDIANA FOR THE PURPOSE OF DETERMINING WHETHER OR NOT PETITIONER STATED A GOOD CAUSE OF ACTION FOR RECOVERY IN HER COMPLAINT ON INSURANCE POLICY EXECUTED AND ISSUED IN COLORADO TO A COLORADO RESIDENT.

The appellate Court of Indiana, in its opinion which was denied transfer to the Supreme Court of Indiana, decided the question of whether or not the Petitioner stated facts sufficient to constitute a cause of action contrary to the Constitution of the United States. The right of the Petitioner to have her complaint tested for sufficiency against the law of Colorado is a right guaranteed by the Full Faith and Credit clause of the Constitution of the United States, Article IV, Section 1.

> The purpose of the full faith and credit provision of the Federal Constitution is to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. *Pink v. A. A. A. Highway Express* 314 U. S. 201, (1941)

The test used to determine the recognition that must be given to the laws of another state by the state in which the litigation is proceeding is to balance the interest each state has in the subject of the litigation. When this con-

flict arises between two states as to which state law should be determinative of the issues presented presents a question under the full faith and credit clause of the Constitution. *Etna Life Ins. Co. v. Dunken* 266 U. S. 389 (1924), *Hartford Accident & Indemnity Co. v. Pine Land Co.* 292 U. S. 143 (1934). It is contended that this guarantee found in the Constitution of the United States performs one of its most important functions when the State under which the particular rights in question arose has decided a same or similar question favorable to the party now asserting its application. In *Pink v. A. A. A. Highway Express* supra. Mr. Chief Justice Stone wrote in reference to this question that:

> When such conflict of interest arises it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another. Citing *Alaska Parkers Asso. v. Industrial Acci. Commission,* 294 U. S. 532 547 (1941), *Pacific Employers Ins. Co. v. Industrial Acci. Commission* 306 U. S. 493 (1930).

The Appellate Court of Indiana held that the law of Colorado did not apply in deciding whether or not the petitioner had stated facts sufficient to constitute a cause of action, rejecting both the Colorado case of *Pyramid Life Ins. Co. v. Masch* 134 Colo. 70, 299 P.2d 117 (1956) and the Colorado statute, to-wit:

> Any foreign life or accident insurance company doing business in the state of Colorado, and where the insurance contract is made in this state, shall pay its obligations when same are due and payable through its agent in the county where the contract was made, or at the office of its general agent within this state,

> after approval by the proper officers at the home office of the company, upon presentation of the insurance contract and proofs required thereunder by the insured, assigns or beneficiaries. This insurance contract shall be deemed to be made and payable in the State of Colorado, if made through an authorized agent of such insurance company within this state, irrespective of where the insurance contract may be written." Colo. Rev. Stat. Ann. Vol. 3 ch 72 art 3 522 p. 957.

It is recognized that "war risk" clauses have been the subject of much litigation and the courts of this County have not agreed on the construction of these clauses. This fact was stated by the Indiana Appellate Court:

> Many State Courts of last resort have been called upon to interpret similar "war risk" clauses as that in the *Pyramid* case and, under the same circumstances some have followed the so-called constitutional interpretation as in the *Pyramid* and *Beley* cases. However, the majority have held that similarly worded clauses under like circumstances should be interpreted in their broad sense and that the Korean Conflict was a "war" within such clause. (Appendix B, pp. 16a-17a)

The Colorado Supreme Court in the Pyramid Life Case stated in deciding this question that:

> We are asked to take judicial notice that the engagements of United States troops in Korea constituted "War"; this, in spite of the fact, as counsel for defendant admit, that "war" was never declared by Congress, the only authority competent to declare it, with respect to the action in Korea. *Pyramid Life Ins. Co. v. Masch* 134 Colo. 70, 299 P.2d 117 (1956).

When a state court is faced with a conflict between its public policy and that of another state, its public policy

may have to subordinated to the law of the state wherein the alleged right arose.

> A recent line of decisions by the United States Supreme Court, however, seems to indicate that the courts of the various states are not free, in the field of conflict of laws, to decline to apply the proper applicable law merely because of their public policy or a local statute contrary to the right involved, and to apply their own law, but that these constitutional provisions place certain restrictions and limitations upon their power in that regard." *John Hancock Mut. Life Ins. Co. v. Yates* 299 U. S. 178 (1938)

If the issue is one of construction of terms contained in a contract and the question is which state law should be followed to establish the meaning of the terms; the law of the place where the contract was executed is controlling.

> When the question of the place where a contract of insurance was made is solved, the determination of the questions as to the construction to be placed upon the terms of the contract and as to the validity thereof and of the laws which are to govern such construction and validity is comparatively easy because it is an almost universal rule that the contract of insurance must be governed by the law of the state where such contract is finally consummated. Where a policy is executed and delivered, and the premiums are paid, in the state of the insured's residence, such policy is governed by the laws of that state. 29 Am. Jur Ins. §31 p. 450

Colorado, the State where this contract was executed, the State of residence of both the Petitioner and the insured followed the minority view or the Constitutional interpretation of the meaning of "war." The full faith and credit clause, Article IV, Section 1, of the Constitution of the United States gives the citizens of each State

the assurance that their legal rights will be decided under the laws of their state. If the State courts are not in agreement resulting in majority and minority position, the impact and importance of the full faith and credit clause as the guardian of the rights of those citizens of a State following the minority view is readily apparent.

II.

WAR SHOULD BE DEFINED IN ITS CONSTITUTIONAL AND LEGAL SENSE TO ASSURE A DEFINITE AND ESTABLISHED STANDARD OF MEANING.

The Constitution of the United States in Article I, section 8, grants and at the same time defines the Power entrusted to the Congress of the United States. Included in these powers granted to Congress is, "the power to declare war". Nowhere in the document that created and at the same time limited the power of the Federal Government is this power to declare war given to any other individual, political body or branch of government. For a "war" in which the United States participates to exist as a state of fact it must be declared by Congress. The definition to be given to the word "war" has been raised in many of the State Courts of this Country. An attempt to gather from the various decision a general rule or guide line as to the meaning of war as used in insurance policies has not been successful.

> "Regarding the question whether in determining the commencement of an armed conflict, the term "war" should be construed in its legal sense, requiring an official declaration of war by Congress, or whether such term should be construed in its broader sense and given its common everyday meaning, the cases are in

inconcilable conflict." 29 A. Am. Jur. Ins. §1206 p. 346.

The Supreme Court of Colorado when faced with this question held:

> The existence or non existence of a state of war is a political not a judicial, question and it is only when a formal declaration of war has been made by the Congress that judicial cognizance may be taken thereof. Once so declared by the political department, it becomes binding upon the Court, otherwise not. *Pyramid Life Ins. Co. v. Masch* supra.

However, the Indiana Appellate Court construed the meaning of the word war in its real and practical sense.

> "In our opinion, when the policy of insurance, which is the subject of this suit, was issued, the parties contracted with reference to war in its real and practical sense and meaning . . ." (Appendix B pp. 22a)

The difficulty which results from construing the meaning of the word "war" in a real or practical sense is that no definite positive standard is established to determine whether or not war exists as a fact unless each individual case wherein the question arises is decided by a court. There have been many military actions taken by the United States which historically are not and could not be considered war. In the Constitutional sense "war" can only exist when it has been declared by Congress. If Congress does not declare war, war as a legal fact does not exist and an undeclared war is a non-legal entity and an ambiguity, there being no definite or established meaning to the terms.

The Indiana Court discussed the issue of the existence or non-existence of a war to great length and decided that question contrary to the law of the State of Colorado and contrary to the full faith and credit clause of the Constitution of the United States.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari to the Supreme Court of Indiana should be granted.

Respectfully submitted,

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APPENDIX A

JUDGMENT ENTRY OF THE MORGAN CIRCUIT COURT, STATE OF INDIANA, JANUARY 8, 1962

In the
Morgan County Circuit Court, State of Indiana
Cause No. 61-C-254

MARIAN FORD STUCKER,

Plaintiff,

v.

THE COLLEGE LIFE INSURANCE COMPANY OF AMERICA,

Defendant.

Sedwich, John E. Jr., Judge

JUDGMENT ENTRY

Comes now plaintiff by counsel, and comes now defendant by counsel, in open court appearing, and the demurrer of the defendant to plaintiff's fourth amended complaint and each count thereof, being Count I as amended by interlineation, and Count II, having been sustained by the Court, to which plaintiff excepted; and plaintiff having thereafter filed its motion to reconsider said ruling on said demurrer, and the Court having overruled plaintiff's said motion, to which plaintiff excepted, and the plaintiff being ordered to file 5th amended complaint on or before

December 23, 1961, elects to abide said ruling on said demurrer, and the Court renders judgment in favor of the defendant The College Life Insurance Company of America.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED by the Court that the plaintiff take nothing by this action, and that the defendant recover of and from plaintiff its costs and charges in this cause laid out and expended, to which plaintiff excepts, and sixty (60) days are granted in which to prepare and tender all Bills of Exceptions, and the plaintiff prays an appeal to the Appellate Court of the State of Indiana, which is granted, upon the filing of a bond to secure payment of costs upon appeal in the sum of $100.00 Dollars with The Royal Indemnity Company as surety, which surety is now approved, and ninety days are allowed for filing said bond.

Entered this 8th day of January, 1962.

John E. Sedwich, Jr.

Judge, Morgan Circuit Court.

APPENDIX B

OPINION OF THE APPELLATE COURT OF INDIANA JULY 7, 1965

In The
Appellate Court of Indiana
No. 19,832

MARIAN FORD STUCKER,

Appellant,

v.

THE COLLEGE LIFE INSURANCE COMPANY OF AMERICA,

Appellee.

APPEAL FROM THE MORGAN CIRCUIT COURT HONORABLE JOHN E. SEDWICH, JR., JUDGE.

FAULCONER, Judge.

The trial court sustained appellee's demurrer to appellant's fourth amended complaint, as amended by interlineation, hereinafter referred to as "amended complaint," and, upon appellant's refusal to plead further, entered judgment that appellant take nothing by her action and that appellee recover costs.

Appellant moved the court to reconsider its ruling on the demurrer, which motion was overruled by the court.

This appeal is from the aforesaid judgment and the errors assigned are 1) the court erred in sustaining appellee's demurrer to the amended complaint; and, 2) the court erred in overruling appellant's motion to reconsider sustaining of appellee's demurrer to the amended complaint. Appellant treats the two assignment of errors as presenting the same issues and presents one argument pertaining thereto.

The amended complaint was in two paragraphs, referred to as Count I and Count II. The first paragraph thereof alleged, in material substance, that on or about March 15, 1951, appellee, an Indiana corporation with its home office and principal place of business in Indianapolis, Indiana, executed its policy of insurance on the life of Lyle D. Stucker in consideration of certain annual premiums; that by the terms of the policy, appellee agreed to pay to the beneficiary thereof the sum of $10,000 upon receipt at its home office of due proof of the death of the insured; that appellant, Marian Ford Stucker, as the wife of the insured, was the beneficiary of said policy; that on the 16th day of October, 1952, the said insured "died in Korea as a result of bullet wounds received in the Country of Korea while in the service of the United Nations"; that appellant furnished appellee with the necessary proofs of death and, although there were no premiums due on the policy and appellant had duly performed all provisions and conditions of the policy, appellee refused to pay the face amount of the policy. Prayer was for $10,000, with interest at six per cent per annum, and all other relief. A copy of the policy was attached to and made a part of the amended complaint.

The second paragraph of the amended complaint alleged that the double indemnity provisions of said policy

provided for the payment of $20,000 if the death of the insured resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means. It further alleged that on October 16, 1952, while said Lyle D. Stucker was serving in the armed forces of the United Nations in the Country of Korea, he died as a result of bullet wounds; that the insured sustained bodily injuries effected directly to accidental, violent and external means, "while engaged in the Korean Action in the Country of Korea," from which injuries he died "in Korea"; and that said insured, "while serving in the armed forces of the United Nations, was killed as a result of wounds received in the Korean Action."

The furnishing to appellee of due proofs of the accidental death of the insured and the refusal of appellee to pay were also alleged. Prayer was for $20,000, with interest at six per cent per annum, and all other relief.

The policy contains an "Aviation and War Risk Exclusion Provision" applicable to the ordinary death benefits of the policy as alleged in the first paragraph of appellant's amended complaint. In pertinent part, said exclusion provision provides:

> "If the death of the Insured
>
> "(1) Results from injury received or disease contracted outside the Home Area as a result of war, while the Insured is in war service or within six months after termination of such service; or
>
> * * * * *
>
> "the amount payable to the beneficiary under this policy shall be a single sum equal to the premiums actually paid on this policy less any dividends returned, with compound interest at the rate of three

per cent per annum, less any indebtedness on the policy; however, the amount so paid shall not be more than would be payable in the absence of this aviation and war risk provision, nor less than the valuation reserve on the life insurance benefit in this policy and on any dividend additions plus the value of any dividend deposits and less any indebtedness on the policy.

"'Home Area' means the forty-eight states of the United States, the District of Columbia, the Dominion of Canada, the Territory of Hawaii and the Territory of Alaska. 'War' means war, or any act of war, declared or undeclared. 'War service' means being in the military, naval or air forces of any country, or international organization, at war, declared or undeclared.

"This provision shall be included in any policy to which this policy may be changed or converted.

"This provision shall not affect or modify the terms of any Double Indemnity or Disability Benefits which may be included in this policy."

Pertinent to the double indemnity benefit relied upon in the second paragraph of appellant's amended complaint, the policy provides that the double indemnity benefit shall be payable if the death of the insured,

"(1) resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent, and accidental means, and

"(2) occurred within ninety days after such injury.

"This Double Indemnity Benefit shall not apply if the Insured's death

"(1) occurs while in the military, naval, or air forces of any Country at war, declared or undeclared; or

"(2) is caused or contributed to by war."

Appellee's demurrer challenged both paragraphs of the amended complaint on the ground that the same do not state facts sufficient to constitute a cause of action.

The memorandum to appellee's demurrer to Count I of the amended complaint sets forth the Aviation and War Risk Exclusion Provision and avers that it affirmatively appears from the allegations of the first paragraph of the amended complaint that the insured's death resulted from "an injury from a bullet wound received in the Country of Korea and outside the 'Home Area' as a result of war while in war service," within the definitions of "Home Area," "War" and "War Service" as defined in the aforesaid Aviation and War Risk Exclusion Provision.

The memorandum to appellee's demurrer to Count II of the amended complaint sets forth the aforesaid provisions of the policy applicable to the double indemnity benefits and avers that it affirmatively appears from the allegations of Count II of the amended complaint that the insured's death occurred in Korea "while [he was] serving in the military, naval or air forces of a country at war" and that his death "was caused or contributed to by war in the Country of Korea."

The real issue presented here is whether the allegations of Count I and Count II of the amended complaint, admitted by the demurrer, bring the insured within the terms of the exclusion provisions of said policy.

At the outset of argument, appellant urges that the "Law of Colorado" should govern the obligations of appellee with respect to the insurance policy here involved. It appears from the application for the insurance, executed by the insured, that it was dated March 15, 1951, and

gave his residence as Box 412, Delta (Delta County) Colorado, and his school address as 714 Remington, Ft. Collins, Colorado.

The application also shows that with the application the insured paid $10 in cash and gave a note for $208.50, one-half due November 1, 1951, and one-half due September 15, 1952. One of the provisions of the application is:

> "[T]hat if the premium is paid to the agent at the time of making the application and *the Company is satisfied that I* [applicant] *was an acceptable risk* for the insurance applied for, the insurance shall be effective as of the date of the application in accordance with the terms and conditions contained in the Receipt attached to and bearing the same serial number as this application." (Emphasis supplied.)

The policy states that it was issued on March 15, 1951, the same date as that of the application. We conclude, therefore, that the policy was made in the State of Colorado, as appellant claims. Such claim is not contested by appellee in its brief. The parties differ, however, on the question of whether the law of Colorado governs the obligation of appellee under the policy.

The materiality of the latter mentioned question arises by reason of a statute of Colorado, and a decision of the Supreme Court of Colorado is cited and relied upon by appellant in support of her contention that we must be governed thereby in our interpretation of the "war clauses" of the policy above set forth. The referred to statute of Colorado is as follows:

> "Any foreign life or accident insurance company doing business in the state of Colorado, and where the insurance contract is made in this state, shall pay its

> obligations when same are due and payable through its agent in the county where the contract was made, or at the office of its general agent within this state, after approval by the proper officers at the home office of the company, upon presentation of the insurance contract and proofs required thereunder by the insured, assigns or beneficiaries. This insurance contract shall be deemed to be made and payable in the state of Colorado, if made through an authorized agent of such insurance company within this state, irrespective of where the insurance contract may be written." 1953 *Colo. Rev. Stat.* Anno., Vol. 3, ch. 72, Art. 3, §22, p. 957.

Simply stated, said statute provides that where an insurance contract is made in the State of Colorado by a foreign insurance company doing business therein, the insurer, upon presentation of the contract and the proofs required thereunder, shall pay its obligations when due, *after approval thereof by the proper officers of the company at its home office,* through its agent in the county where the contract was made, or at the office of its general agent within the State. We see nothing within the terms of the quoted section of the statute which seeks to impose upon us the duty of adopting any particular construction of the insurance contract, or of applying the law of any certain jurisdiction in arriving at a conclusion as to the herein contested "obligations" of appellee under the policy. In fact, as we construe said Act, the "obligations" of the appellee under the policy do not become due and payable until the same are approved "by the proper officers *at the home office*" of appellee. (Emphasis supplied.) Under the heading of "General Provisions" of the policy, Clause 13 thereof provides that the "home office" of appellee, where the premiums are to be paid, is "in the city of Indianapolis, Indiana."

Upon the theory that we "will interpret the obligations of appellee with reference to the decisions of the Courts of Colorado," appellant cites and relies heavily upon the case of *Pyramid Life Insurance Company v. Masch* (1956), 134 Colo. 70, 299 P. 2d 117. It appears from the decision in that case that Masch, father of the insured, brought action on the insurance contract to recover the primary and double indemnity benefits of the policy. The latter contained a condition that in case of the death of the insured "while in military service or naval service in time of war * * * the liability of the company shall be limited to the premiums paid * * * ." The insured, while a private in the United States Army, was killed in South Korea. The defendant-company moved to dismiss the complaint because it failed to state a claim upon which relief could be granted. The motion was overruled by the trial court and the company appealed. The Colorado Court *in* construing the meaning of the particular war clause contained in the policy before it, concluded that "[T]he existence or nonexistence of a state of war is a political, and not a judicial, question," and that judicial cognizance of a "state of war" may be taken only when a formal declaration of war has been made by Congress.

The Supreme Court of Colorado in the *Pyramid* case, at page 119 of 299 P. 2d, stated:

> "Any doubt concerning the meaning of a word or clause in a life insurance policy should be resolved in favor of the insured. *Had the defendant desired to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'war' meant 'hostilities', whether or not declared by Congress to be a state of war.*" (Emphasis supplied.)

Also, in *Beley v. Pennsylvania Mut. Life Ins. Co.* (1953), 373 Pa. 231, 95 A. 2d 202, 36 A.L.R. 2d 996, (Cert, denied, 346 U.S. 820, 74 S. Ct. 34, 98 L. Ed. 346), cited for support in the *Pyramid* case, and likewise adhering to the constitutional theory of interpretation of a similar clause under like circumstance, after holding that the Korean Conflict was *not* a "war" within the terms of the war risk clause "in time of war", the court, at page 205 of 95 A. 2d, said:

> "[I]t may be assumed, therefore, that if defendant had here meant to invest the term 'war' with a broader connotation than its 'constitutional' or 'legal' intendment, it would have effected this by the addition of the words indicating such an intention as, for example, 'declared or undeclared' war."

Also, Judge Musmanno, in a concurring opinion, at page 218 of 95 A. 2d, said:

> "If the Beley insurance contract had included the phrase 'undeclared war,' which the Korean Conflict indubitably is, no problem would have arisen because the Korean Conflict, in the constitutional sense, indubitably is an undeclared war."

In the light of the distinction of the clauses in the decisions cited by appellant and the clauses in the present policy, and further considering the references made in the Pyramid and Beley cases to possible words of explanation, we feel that those cases cited by appellant, and specifically the Pyramid case, are not controlling in the case at bar.

There can be no question, we think, that the allegations of Count I of the amended complaint definitely show that the insured received his fatal injury outside the "Home Area", as that term is defined in the Aviation and War

Risk Exclusion Provision of the regular policy. The primary argument advanced by appellant and appellee goes to the point of whether the admitted alleged facts of the amended complaint show that the insured received his fatal injury "as a result of war, while * * * in war service." "War" as defined in said policy provision means "war, or any act of war, declared or undeclared" and "war service" means "being in the military, naval or air forces of any country, or international organization, at war, declared or undeclared." The pertinent allegations of the amended complaint are that the insured died as a result of bullet wounds in the Country of Korea while in the service of the United Nations.

Appellant's whole advanced argument, aside from the already disposed of contention that we must be governed by the law of Colorado, is to the effect that "[b]efore the Korean Action can be considered legally as a war within the meaning of the Constitution of the United States it must be recognized and declared as a war by the Congress of the United States" which, appellant states, "Congress * * * to this day has not in its wisdom seen fit to do so.", and, further, that " 'war service' can only mean, legally speaking, declared war service." Appellant asserts that according to the Supreme Court of Indiana "a state of affairs can be war only when so declared legally by the political and not the judicial department", and cites *Perkins v. Rogers* (1871), 35 Ind. 124. Of course, a declared or solemn war must be declared by the political department of government. There appears to be no conflict as to this principle. However, in *Baker v. Gordon and Another* (1864), 23 Ind. 204, at page 208, the Supreme Court quoted from the opinion of Justice Grier in 2 Black's R. 635, that a state of war " 'may exist without

a declaration on either side.'" And quoted further from Justice Grier's opinion to the effect that "[i]f it were necessary to the technical existence of war that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861 * * *." This last quotation is of interest since the principle announced finds its way into the very latest cases dealing with the Korean Action, some of which are hereinafter referred to.

The difficulty we encounter with appellant's proposals is twofold. *First*, there is no allegation in the amended complaint that the United States was involved in the "Korean Action" on October 16, 1952, or that the insured, at the time of his fatal injury, was there in the military, naval or air forces of the United States; and, *Second*, the referred to exclusions provision of the policy does not, by expression, limit the word "war" to any country.

We find the following language in *Stankus, v. New York Life Ins. Co.* (1942), 312 Mass. 366, 368, 44 N.E. 2d 687, at pages 688, 689:

> "As in the case of any other contract, the words of an insurance policy, in the absence of ambiguity, must be given their usual and ordinary meaning. The term 'war' is not limited, restricted or modified by anything appearing in the policy. It refers to no particular type or kind of war, but applies in general to every situation that ordinary people would commonly regard as war. There is nothing in the policy that indicates that the word [war] was used in any vague, indefinite or ambiguous sense. A policy of insurance whose provisions are plainly and definitely expressed in appropriate language must be enforced in accordance with its terms. We hold that the clause exempting the defendant from liability where death is caused by war is not restricted in its operation to a death

that has resulted from a war being prosecuted by the United States."

In defining "war service", the exclusionary clauses of the regular policy provide expanded reference to "any country or *international organization* at war." (Emphasis supplied.) In view of this language and the specific definitions of the terms employed, we fail to perceive the applicability, under the fact allegations of the amended complaint, of appellant's contention that the Congress of the United States had not formally declared war. The amended complaint puts the insured in the armed forces of the United Nations, but appellant advances no argument or discussion nor makes any reference to the legal consequences of such alleged fact as regards the involved exclusionary provision. Nor is the case of *Pyramid Life Insurance Company v. Masch, supra,* 134 Colo. 70, 229 P. 2d 117, relied upon by appellant, of any assistance to her on the last mentioned point because, in the complaint in that case it was alleged that the insured was a Private First Class in the military service of "the United States Army" and was killed in the vicinity of Hangye, South Korea. And likewise, in the case of *Beley v. Pennsylvania Mut. Life Ins. Co., supra* (1953), 373 Pa. 231, 95 A. 2d 202, 36 A.L.R. 2d 996, also relied upon by appellant, it appears that Beley, the insured, was "serving with the *United States contingent* of the United Nations forces" when he was "killed" in action in Korea. (Emphasis supplied.) It is observed, from the herein insured's application, that he (Lyle D. Stucker) gave his occupation as that of student and that his address was 714 Remington, Ft. Collins, Colorado, and that he was a "Janitor of Military Bldg., on Campus." But we find nothing in the amended complaint or in the policy of insurance which avers or shows that the insured was serving in the mili-

tary arm or branch of the United States forces when he received his fatal injury.

Appellant, in the argument section of her brief, after setting forth pertinent allegations of Count I and Count II of her amended complaint and the applicable portions of the two exclusionary provisions, concludes that,

> "From the foregoing, it therefore appears without question, the following:
>
> "That Lyle Stucker, husband of Appellant, died on October 16, 1952, of bullet wounds received in the Country of Korea while serving in the armed forces of the United Nations, at which time appellee had in full force and effect a policy of insurance upon the life of said Stucker, including a double indemnity benefit clause, payable to Appellant as beneficiary.
>
> "The only issue thus presented to this Court and the Court below, as raised by Appellee's demurrer, may be simply stated:
>
> "Do the 'war clause' exclusions as set forth in the policy of insurance executed by appellee upon the life of Appellant's late husband apply in the case of death occurring from bullet wounds received by him while serving in the armed forces of the United Nations in the Korean Action?"

Appellant and appellee confine themselves in their briefs exclusively to this sole question except for the point of which State law controls. We are then left to determine whether the "Korean Action", alleged in the amended complaint, was "war", declared or undeclared, as the term is used in said exclusion clause of appellee's policy. Appellant offers us no help on this particular question and makes no mention of it in the argument section of her brief except to say that with reference to the Korean Action the Congress of the United States has never de-

cleared it a war. Under the challenged allegations of appellant's amended complaint it is not necessary to find that the United States was at war; it is sufficient, in passing upon whether the amended complaint states a cause of action, to find whether, on October 16, 1952, a war existed between North Korea and South Korea (referred to in the amended complaint as the "Korean Action"). Much time and labor could be expended in setting forth herein, in detail, the factual situation which establishes quite clearly that on October 16, 1952, North Korea and South Korea were then actually at war with each other. Several cases contain extensive facts on this general issue to support this conclusion.

Thomas v. Metropolitan Life Insurance Company (1957), 388 Pa. 499, 131 A. 2d 600;

Stankus v. New York Life Ins. Co., supra (1942), 312 Mass. 366, 44 N.E. 2d 687;

Lynch v. National Life and Accident Insurance Co. (1955), Mo. App., 278 S.W. 2d 32.

We consider it sufficient to state that according to the Department of Defense Report of August 19, 1953, the United States casualties in the Korean Conflict totalled 139,834, of whom 25,604 were killed in action. Also, that more than one million members of the armed forces of United States were engaged in Korea from June 25, 1950, to July 27, 1953, and the cost of the conflict to the United States was about $22 Billion Dollars.

Many State Courts of last resort have been called upon to interpret similar "war risk" clauses as that in the Pyramid case and, under the same circumstances, some have followed the so-called constitutional interpretation

as in the Pyramid and Beley cases. However, the majority have held that similarly worded clauses under like circumstances should be interpreted in their broad sense and that the Korean Conflict was a "war" within such clause.

Langlas v. Iowa Life Ins. Co. (1954), 245 Iowa 713, 63 N.W. 2d 885;

Carius v. New York Life Insurance Company (1954), 124 F. Supp. 338;

Lynch v. National Life and Accident Insurance Co., supra (1955), Mo. App. 278 S.W. 2d 32;

O'Neil v. Union National Life Insurance Company (1956), 162 Neb. 284, 75 N.W. 2d 739;

Thomas v. Metropolitan Life Insurance Company, supra (1957), 388 Pa. 499, 131 A. 2d 600;

O'Daniel v. Missouri Insurance Co. (1959), 24 Ill. App. 2d 10, 164 N.E. 2d 78;

Harding v. Pennsylvania Mut. Life Ins. Co. (1953), 373 Pa. 270, 95 A. 2d 221;

See also:

Annot., 36 A.L.R. 2d 1018 (1954).

In some recent cases the courts have dealt with war risk clauses having more similarity to the ones we are considering in that they contain the words "declared or undeclared" either following, preceding or defining the term "war" used in said clauses. All cases of this nature which we can find have interpreted the Korean Conflict as an "undeclared war" within the provision of said exclusions.

Goodrich v. John Hancock Mut. Life Ins. Co. of Boston (1962), 234 N.Y.S. 2d 587;

Lamar v. John Hancock Mutual Life Insurance Co. (1959), 249 N.C. 643, 107 S.E. 2d 65;

Wilkinson v. Equitable Life Assurance Society (1956), 151 N.Y.S. 2d 1018;

Zuccardo v. John Hancock Mutual Life Insurance Co. (1956), 20 Conn. Supp. 75, 124 A. 2d 926.

In *Goodrich v. John Hancock Mut. Life Ins. Co. of Boston, supra,* (1962), 234 N.Y.S. 2d 587, at page 590, the court said:

> "We are not so far removed from reality but to recognize that in the language of the average person, the conflict in Korea was considered a war, not by declaration but by the fact that our armed forces were sent there and participated in the fighting, and our soldiers were wounded and died on the battlefields of Korea."

In *Lynch v. National Life and Accident Insurance Co., supra,* (1955), Mo. App., 278 S.W. 2d 32, at page 38, the court said:

> "We are not willing to shut our eyes to the inescapable fact that the United States was engaged in a "shooting war' in Korea, which is clearly and forcefully demonstrated by casualties inflicted upon members of the military forces of the United States. . . . What additional proof is required to conclusively establish that such grim consequences can only result from a war as that term is understood by individuals of ordinary and common understanding?"

Even if we were to concede, as appellant strongly urges, that we are bound by the holding of the Colorado Court

in Pyramid Life Insurance Company v. Masch, supra, no benefit would be derived therefrom because that court specifically states that it was asked to take judicial notice that the engagements of "United States troops" in Korea constituted war. As we have heretofore pointed out, no such question is here before us.

For this court to hold that so-called "Korean Action" was not a war would be closing our eyes to the events of our times and to the world in which we live. The world of chivalry in conflict between nations ended abruptly with the infamous attack on Pearl Harbor. The progress of science in the art of war has so far advanced that any thought we may entertain that our nation would be allowed an opportunity to formally declare war is certainly burying our heads in the sand to reality.

Not only has the machinery of attacking another nation been refined to a point that has virtually disposed of warning, but the weapons of attack and their destructive power are so devastating as to be nearly incomprehensible. In this world of restlessness in every country, with our resources, both material and human, being used in every corner of the earth, and possibly in the near future into outer space, the law must recognize what we know as individuals. To say that the attack on Pearl Harbor, the action in Korea, the activities in Viet Nam are not wars, and that those killed were not killed by war, is saying, in effect, that war is not war.

Attacks without warning, so-called police actions throughout the world, American service men on every continent, are a fact of life and a part of our way of life, whether we approve or not. Freedom for mankind is challenged every minute of every day and its enemies are unconcerned with the formalities of yesterday and will re-

sort to any means they feel necessary to accomplish their desired goal.

The parties here agreed, as stated in the written contract of insurance entered into between them, that "war" means "war, declared or undeclared." We must give effect to what the parties expressly agreed upon and we fail to find any authority, and none has been called to our attention, which authorizes us to disregard the express language of the parties, or place a strained interpretation thereon contrary to the intent of the parties expressed in words of common understanding and acceptation.

The exclusionary provisions here under surveilance are a private matter between the parties, unaffected by public interest. The general rules governing the construction of such contracts must be applied and, in determining the intent of the parties, the terms employed must be understood and interpreted in their popular and ordinary meaning. There is nothing in the insurance contract before us to indicate that any special or different meaning was intended by the parties, or that an absurd or unreasonable result would attain in applying the rule of interpretation according to the ordinary and popular meaning of the phraseology and wording used in the contract.

We see no reason or justification to say that when the parties to the herein policy agreement expressed that "war" meant war, "declared or undeclared", they did, in fact, mean a war duly declared by the proper authority. If we were to so say, then we would be in the position of remaking the contract for the parties. Such is not the proper function of this court.

In the case of *New York Life Ins. Co. v. Durham* ((1948), C.C.A. 10), 166 F. 2d 874, the Circuit Court of

Appeals for the Tenth Circuit considered a clause nearly identical to the one before us, where the death of the insured occurred after the surrender of our enemies, but before an official declaration by our Government formally terminating the existence of a state of war. The court, speaking through Judge Murrah, at page 876 of 166 F. 2d, stated:

> "The parties in this case, as in the Bennion case, contracted with reference to a risk assumed for a premium paid. When they came to express the limitations upon the risk assumed, they obviously had in mind the extraordinary risk incident to service in the military forces of any country engaged in war, declared or undeclared. By including undeclared war, they chose not to use the word 'war' in its technical or formal sense, but rather in the practical and realistic sense in which it is commonly used and understood—in the sense it bears to the hazards to human life."

What we have already said and determined applies with full and equal force to the war exclusionary provision, above set out, pertaining to the contract limitation of liability of appellee for double indemnity benefits. It is therein provided that double indemnity benefits shall not apply if the insured's death "is caused or contributed to by war." We have held that the Korean Conflict alleged in appellant's amended complaint was war. The exclusionary provision does not restrict the word "war" to a war in which the United States is engaged. Count II of the amended complaint alleges that the deceased, insured, "sustained bodily injuries affected [effected] directly to accidental violent and external means while engaged in the Korean Action" from which injuries he died on October 16, 1952. Thus, it appears from the amended complaint that the insured's death was contributed to by the Korean Action which we have held to be a war.

In our opinion, when the policy of insurance, which is the subject of this suit, was issued, the parties contracted with reference to war in its real and practical sense and meaning, and we, therefore, conclude that neither Count I nor Count II of appellant's amended complaint stated a cause of action for recovery of the Ordinary Death Benefit or the Double Indemnity Death Benefit of the insurance contract herein.

Judgment affirmed.

Bierly, C.J., Carson, Hunter, Mote and Smith, JJ. concur.

Prime, P.J. concurs in result.

While Judge Martin participated in the hearing of oral argument and a conference of the judges above named, he was not present at the time of, and did not participate in, the adoption of this opinion.

APPENDIX C

OPINION (PERTINENT PART) OF THE APPELLATE COURT OF INDIANA ON PETITION FOR REHEARING NOVEMBER 8, 1965

In The
Appellate Court of Indiana
No. 19832

MARIAN FORD STUCKER,

Appellant,

v.

THE COLLEGE LIFE INSURANCE COMPANY OF AMERICA,

Appellee.

Faulconer, Judge

ON PETITION FOR REHEARING

Appellant has filed her purported petition for rehearing consisting of twelve allegations of error. Each is a flat conclusion that this court erred in holding or failing to hold, or ruling or not ruling, as appellant desired.

Appellee has filed a petition to dismiss the petition for rehearing as not complying with Rule 2-22, Rules of the

Supreme Court. Although we have serious doubts concerning the compliance of said petition for rehearing with said rule, we are of the opinion that the petition to dismiss should be denied and appellant given the benefit of "sufficient compliance" with the rule. Therefore, appellee's petition to dismiss appellant's petition for rehearing is denied.

Specifications 1, 2, 3, and 4 of appellant's petition for rehearing merely state that this court erred in sustaining the trial court's action sustaining appellee's demurrer; in sustaining the trial court's overruling of appellant's motion to reconsider; in ruling that the law of Colorado did not control the construction of the contract; and in not giving full faith and credit to the laws of Colorado. Suffice to say that we carefully considered these issues and sufficiently covered them in our opinion.

Petition for rehearing denied.

Bierly, C. J., Prime, P. J., Carson, Hunter, Mote and Smith, JJ. concur.

Wickens, J. not participating.

APPENDIX D

Colorado Rev. Stat. Ann., Vol 3, Ch. 72, Art. 3, § 22 p. 957.

> Any foreign life or accident insurance company doing business in the state of Colorado, and where the insurance contract is made in this state, shall pay its obligations when same are due and payable through its agent in the county where the contract was made, or at the office of its general agent within this state, after approval by the proper officers at the home office of the company, upon presentation of the insurance contract and proofs required thereunder by the insured, assigns or beneficiaries. This insurance contract shall be deemed to be made and payable in the State of Colorado, if made through an authorized agent of such insurance company within this state, irrespective of where the insurance contract may be written."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 963

MARIAN FORD STUCKER,

Petitioner,

v.

THE COLLEGE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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ARGUMENT

I.

THE COURTS OF INDIANA HAVE GIVEN FULL FAITH AND CREDIT TO THE STATUTE AND CASE LAW OF COLORADO

(a) *General.* The first federal question raised by the Petitioner, Marian Ford Stucker, considers the full faith and credit clause of the United States Constitution. This question was belatedly raised by the Petitioner for the

first time in her BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING, filed in the Appellate Court of Indiana on July 27, 1965; after the Appellate Court of Indiana, in *banc,* had heard the case argued on two separate occasions.

Prior to the Petition for Rehearing, the Petitioner had relied upon but one issue. That one issue is best described in the Petitioner's own words, found at page 52-53 of her APPELLANT'S BRIEF, filed in the Appellate Court of Indiana:

> "The only issue thus presented to this Court and the Court below, as raised by Appellee's demurrer, may be simply stated: 'Do the "war clause"' exclusions as set forth in the policy of insurance executed by appellee upon the life of Appellant's late husband apply in the case of death occurring from bullet wounds received by him while serving in the armed forces of the United Nations in the Korean Action?'"

The Indiana Courts, however, were not unmindful of the full faith and credit requirements levied by the United States Constitution. The Indiana Courts considered the statute of Colorado and decision of the Supreme Court of Colorado cited and relied upon by the Petitioner in support of her contention.

The Indiana Courts gave validity to both the Colorado statute and the decision of the Colorado Supreme Court.

(b) *Indiana Courts Gave Validity to Colorado Statute.* As pointed out in *Finney v. Guy,* 189 U. S. 335, 340, and *Allen v. Allegheny Co.,* 196 U. S. 458, 463, it is not true to say that necessarily in every case where the court of one state is called upon to determine the proper construction of a statute of another state, a question under

the Constitution of the United States automatically arises. Although the Colorado Statute (Appendix 1 of this Brief) was at issue and its meaning was necessarily involved, the duty of construing it rested upon the courts of Indiana since the Colorado courts had not had an occasion to construe the statute relied upon by Petitioner. It was, therefore, a matter of first impression, and incumbent upon the Indiana courts to interpret it. In its written opinion on the merits of the case, the Appellate Court of Indiana considered the subject Colorado statute; 208 N. E. 2d, 731, 734. After quoting the statute, the court said at page 734 of 208 N. E. 2d:

> "Simply stated, said statute provides that where an insurance contract is made in the State of Colorado by a foreign insurance company doing business therein, the insurer, upon presentation of the contract and the proofs required thereunder, shall pay its obligations when due, *after approval thereof by the proper officers of the company at its home office,* through its agent in the county where the contract was made, or at the office of its general agent within the State. We see nothing within the terms of the quoted section of the statute which seeks to impose upon us the duty of adopting any particular construction of the insurance contract, or of applying the law of any certain jurisdiction in arriving at a conclusion as to the herein contested 'obligations' of appellee under the policy. In fact, as we construe said Act, the 'obligations' of the appellee under the policy do not become due and payable until the same are approved 'by the proper officers *at the home office*' of appellee. (Emphasis supplied.) Under the heading of 'General Provisions' of the policy, Clause 13 thereof provides that the 'home office' of appellee, where the premiums are to be paid is 'in the city of Indianapolis, Indiana'."

The Indiana courts considered, gave validity to and, in fact, construed the Colorado statute relied upon by the Petitioner. The Petitioner seeks to invoke the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257(3), alleging that the Indiana courts violated her rights guaranteed by the "full faith and credit" clause of the United States Constitution. But she has failed to show where the validity of the Colorado statute was denied nor given effect.

The Respondent respectfully suggest that the construction given the Colorado statute, in the absence of any construction placed thereon by the Colorado courts, is reasonable and proper. Had the Colorado legislature sought to give a broader meaning to the subject statute than found there by the Indiana courts, it would very likely have followed, as have several other states, the example of the New York legislature which in the New York Insurance Code, the same being Chapter 882, Laws of 1939, as amended, Section 143(2), provided in part:

> "2. No contract or policy of insurance delivered or issued for delivery in this state shall provide that the rights or obligations of the insured or of any person rightfully claiming thereunder shall, with respect to policies of life, accident or health insurance or annuity contracts upon persons resident in, or to policies of insurance upon property then in this state, or with respect to the liabilities to be incurred by the insured as a result of any activity then carried on by the insured in this state, *be governed by the laws of any state or country other than this state.* This subsection shall not apply to contracts of marine insurance." (our emphasis)

(c) *Indiana Courts Gave Validity to Colorado Case Law.* The Indiana courts considered the Colorado Su-

preme Court case relied upon by Petitioner, the same being *Pyramid Life Insurance Company v. Masch* 134, Colo. 70, 299 P. 2d 117. [See Appendix 2 herein for the entire text of this short opinion]

At pages 734 to 735 of 208 N. E. 2d, the Appellate Court of Indiana examined the *Pyramid Life case,* quoting and emphasizing the following language of the Colorado Supreme Court:

> "Any doubt concerning the meaning of a word or clause in a life insurance policy should be resolved in favor of the insured. *Had the defendant desired to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'war' meant 'hostilities,' whether or not declared by Congress to be a state of war.*" (Emphasis supplied).

The *war exclusion* clause in the *Pyramid case* only provided:

> "In case of death of the insured * * * *in time of war* * * * the liability of the Company shall be limited to the premium paid hereon * * *." (our emphasis)
>
> (cited in *Pyramid Life Insurance Company v. Masch, supra*)

It was this *war exclusion* clause that the Colorado Court had before it when it stated in its opinion:

> "Any doubt concerning the meaning of a word or clause in a life insurance policy should be resolved in favor of the insured. *Had the defendant desired to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'war' meant 'hostilities', whether or not declared by Congress to be a state of war.*" (our emphasis)

As a matter of fact, the *war exclusion* clauses which the Indiana courts were construing in this cause, bear no similarity to those being construed by the Colorado Courts in the *Pyramid Life case.* [See Appendix 3 for Respondent's *war exclusion* causes herein]. The Indiana courts weighed the *war clause* exclusions found in the Respondent's policy of insurance, the subject matter of the controversy, and reasoned that they were significantly different than those found in the *Pyramid Life case* and within the reservation held by the Colorado Court when it said therein, "Had the defendant desired to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'war' meant 'hostilities', whether or not declared by Congress to be a state of war." Thus, it was that the Appellate Court of Indiana said at page 739 of 208 N. E. 2d, regarding this:

> "We see no reason or justification to say that when the parties to the herein policy agreement expressed that 'war' meant war, 'declared or undeclared', they did, in fact, mean a war duly declared by the proper authority. If we were to so say, then we would be in the position of remaking the contract for the parties. *Such is not the proper function of this court.*" (our emphasis)

II.

APPLICATION OF ARTICLE I, SECTION 8, OF THE UNITED STATES CONSTITUTION TO THE CASE AT BAR

(a) *General.* The second and final point raised by Petitioner, Marian Ford Stucker, requires the Respondent to discuss the applicability of Congressional War Powers to this cause. The Petitioner's view ignores the language

of the *war exclusion* clauses found in Respondent's policy of insurance, (See Appendix 3) and the intentions of the parties to the insurance contract herein.

The import of the *war exclusion* provisions found in the subject insurance policy was to avoid the very ambiguity complained of by the Petitioner. The Indiana courts devoted much time to the construction of this language in the policy of insurance and concluded that the parties had contracted with reference to war in its real and practical sense and meaning. This must be contrasted to the policy of insurance issued by the Pyramid Life Insurance Company being construed by the Colorado Supreme Court. The Pyramid "war exclusion" clause referred only to *war* without further modification; consequently, the doubt of the meaning of the word *war* was construed against the insurance company. Notwithstanding their decision, the Colorado Supreme Court said it would be possible for an insurance company to include in their *war exclusion* clauses both the formal definition of war, as used in the traditional sense, and the twentieth-century definition of war in fact, though not formally declared by Congress.

At pages 734 to 735 of 208 N. E. 2d, the Appellate Court of Indiana examined the two cases relied upon by the Petitioner to support her position - *Pyramid Life Insurance Company v. Masch, supra,* and *Beley v. Pennsylvania Mutual Life Insurance Company,* 373 Pa. 231, 95 A. 2d 202, (*Cert. denied* 346 U. S. 820).

The Indiana courts found that the distinction between the *Beley case* and *Pyramid Life case,* when contrasted to the case at bar, turned on the wording chosen by the Pyramid Life Insurance Company and the Pennsylvania Mutual Life Insurance Company for their respective *war*

exclusion clauses. The Indiana courts quoted the Supreme Court of Colorado in the *Pyramid case*, at page 119 of 299 P. 2d, stating:

> "Any doubt concerning the meaning of a word or clause in a life insurance policy should be resolved in favor of the insured. *Had the defendant desired to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'war' meant 'hostilities', whether or not declared by Congress to be a state of war.*" (Emphasis supplied.)

and quoted Judge Musmanno in the *Beley case* at Page 218 of 95 A. 2d:

> "If the Beley insurance contract had included the phrase 'undeclared war,' which the Korean Conflict indubitably is, no problem would have arisen because the Korean Conflict, in the constitutional sense, indubitably is an undeclared war."

The Indiana courts concluded at page 735 of 208 N. E. 2d:

> "In the light of the distinction of the clauses in the decisions cited by appellant and the clauses in the present policy, and further considering the references made in the Pyramid and Beley cases to possible words of explanation, we feel that those cases cited by appellant, and specifically the Pyramid case, are not controlling in the case at bar."

(b) *Congressional Declaration of War is Immaterial to Issues Raised in Case at Bar.* From pages 735 through 740, of 208 N. E. 2d, the Appellate Court of Indiana examined the *war-exclusion* clauses in the Respondent's policy of insurance. The Appellate Court of Indiana determined that the Respondent had used an expanded definition of *war* in its *war clauses*, which, unlike those

used in *Beley* and *Pyramid* relied upon by Petitioner, were capable of broader construction.

In discussing this issue below, the Appellate Court of Indiana said at pages 735 and 736 of 208 N. E. 2d:

> "* * * The pertinent allegations of the amended complaint are that the insured died as a result of bullet wounds in the Country of Korea while in the service of the United Nations.
>
> "Appellant's whole advanced argument, aside from the already disposed of contention that we must be governed by the law of Colorado, is to the effect that '[b]efore the Korean Action can be considered legally as a war within the meaning of the Constitution of the United States it must be recognized and declared as a war by the Congress of the United States' which, appellant states, 'Congress * * * to this day has not in its wisdom seen fit to do so.', and further, that 'war service' can only mean, legally speaking, declared war service. * * *"
>
> "The difficulty we encounter with appellant's proposals in twofold. *First,* there is no allegation in the amended complaint that the United States was involved in the 'Korean Action' on October 16, 1952, or that the insured, at the time of his fatal injury, was there in the military, naval or air forces of the United States; and, *Second,* the referred to exclusion provision of the policy does not, by expression, limit the word 'war' to any country. * * *"

The Appellate Court of Indiana, at page 736 of 208 N. E. 2d, then said:

> "In defining 'war service', the exclusionary clauses of the regular policy provide expanded reference to 'any country or *international organization* at war.' (Emphasis supplied.) In view of this language and the specific definitions of the terms employed, we

fail to perceive the applicability, under the fact allegations of the amended complaint, of appellant's contention that the Congress of the United States had not formally declared war. The amended complaint puts the insured in the armed forces of the United Nations, but appellant advances no argument or discussion nor makes any reference to the legal consequences of such alleged fact as regards the involved exclusionary provision.' * * *"

"* * * But we find nothing in the amended complaint or in the policy of insurance which avers or shows that the insured was serving in the military arm or branch of the United States forces when he received his fatal injury. * * *"

After further explanation, the Court concluded, at page 737 of 208 N. E. 2d, that:

"* * * Under the challenged allegations of appellant's amended complaint it is not necessary to find that the United States was at war; it is sufficient, in passing upon whether the amended complaint states a cause of action, to find whether, on October 16, 1952, a war existed between North Korea and South Korea (referred to in the amended complaint as the 'Korean Action'). Much time and labor could be expended in setting forth herein, in detail, the factual situation which establishes quite clearly that on October 16, 1952, North Korea and South Korea were then actually at war with each other. * * *"

It was upon this foundation that the Court held at page 739 of 208 N. E. 2d:

"The parties here agreed, as stated in the written contract of insurance entered into between them, that 'war' means 'war, declared or undeclared.' We must give effect to what the parties expressly agreed upon and we fail to find any authority, and none has been

called to our attention which authorizes us to disregard the express language of the parties, or place a strained interpretation thereon contrary to the intent of the parties expressed in words of common understanding and acceptation.

"The exclusionary provisions here under surveillance are a private matter between the parties, unaffected by public interest. The general rules governing the construction of such contracts must be applied and, in determining the intent of the parties, the terms employed must be understood and interpreted in their popular and ordinary meaning. There is nothing in the insurance contract before us to indicate that any special or different meaning was intended by the parties, or that an absurd or unreasonable result would attain in applying the rule of interpretation according to the ordinary and popular meaning of the phraseology and wording used in the contract."

The Court applied the same logic to the *war exclusion* clause of the double indemnity benefit of the subject insurance policy, saying at page 739 of 208 N. E. 2d:

"What we have already said and determined applies with full and equal force to the war exclusionary provision, above set out, pertaining to the contract limitation of liability of appellee for double indemnity benefits. It is therein provided that double indemnity benefits shall not apply if the insured's death 'is caused or contributed to by war.' We have held that the Korean Conflict alleged in appellant's amended complaint was war. The exclusionary provision does not restrict the word 'war' to a war in which the United States is engaged. Count II of the amended complaint alleges that the deceased, insured, 'sustained bodily injuries affected [effected] directly to accidental violent and external means while engaged in the Korean Action' from which injuries he died on October 16, 1952. Thus, it appears from the

amended complaint the insured's death was contributed to by the Korean Action which we have held to be a war."

The Court, mindful that the Petitioner had relied heavily on the Colorado case, said, at page 738 of 208 N. E. 2d:

> "Even if we were to concede, as appellant strongly urges, that we are bound by the holding of the Colorado Court in *Pyramid Life Insurance Company v. Masch, supra,* no benefit would be derived therefrom because that court specifically states that it was asked to take judicial notice that the engagement of 'United States troops' in Korea constituted war. As we have heretofore pointed out, no such question is here before us."

The Indiana Courts found Respondent's *war exclusion* clauses to be sufficiently broad to include "undeclared" war, saying at page 740, of 208 N. E. 2d:

> "In our opinion, when the policy of insurance, which is the subject of this suit, was issued, the parties contracted with reference to war in its real and practical sense and meaning, and we, therefore, conclude that neither Count I nor Count II of appellant's amended complaint stated a cause of action for recovery of the Ordinary Death Benefit or the Double Indemnity Death Benefit of the insurance contract herein."

Therefore, to make the Respondent's *war exclusion* clauses operative, it was unnecessary to show that Congress had formally declared war.

CONCLUSION

For each and all of the foregoing reasons, the Respondent respectfully suggests to the Court that Petitioner's Writ of Certiorari to the Supreme Court of Indiana be denied.

Respectfully submitted,

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"APPENDIX 1"

"Duties of foreign companies. —

Any foreign life or accident insurance company doing business in the state of Colorado, and where the insurance contract is made in this state, shall pay its obligations when same are due and payable through its agent in the county where the contract was made, or at the office of its general agent within this state, after approval by the proper officers at the home office of the company, upon presentation of the insurance contract and proofs required thereunder by the insured, assigns or beneficiaries. This insurance contract shall be deemed to be made and payable in the state of Colorado, if made through an authorized agent of such insurance company within this state, irrespective of where the insurance contract may be written."

1963 COLORADO REV. STAT. ANNO., Vol. 4, Ch. 72, Art. 3, § 22,

"APPENDIX 2"

(Full Text of Pyramid Life Insurance Company v. Masch, (1956) 134 Colo. 70, 299, P. 2d 117

"We will refer to the parties as they appeared in the trial court where defendant in error was plaintiff and plaintiff in error was defendant.

"Plaintiff, father of John Morgan Masch, instituted this action to recover on a life insurance policy issued by defendant on the life of John Morgan Masch, which policy was dated January 17, 1941, and in which plaintiff was named beneficiary. By this insurance contract defendant agreed to pay plaintiff one thousand dollars in the event of the death of his son; it provided inter alia: '11. Other conditions. (1) * * * (4) In case of the death of the insured while in military service or naval service in time of war or within six months thereafter as a result of such service, the liability of the Company shall be limited to the premium paid hereon, unless the Insured shall have received the Company's permission to engage in such service and shall have paid the extra premium required.'

"A copy of the policy was attached to and made a part of plaintiff's complaint which alleged, in addition to the issuance of the insurance, that while the policy was in full force and effect, on May 17, 1951, the insured was a Private First Class in the military service of the United States Army and was killed in the vicinity of Hangye, South Korea. It was further alleged that due proofs of loss were sub-

mitted to defendant and that payment of the face of the policy had been refused. Prayer was for judgment in favor of plaintiff in the sum of $1,000, interest and costs.

"The defendant filed a motion to dismiss the complaint, 'because the complaint fails to state a claim against the defendant upon which relief can be granted.' This motion was overruled, whereupon defendant declined to plead further and judgment was entered in favor of plaintiff as prayed for in the complaint. From this judgment the defendant is here on writ of error.

"For reversal it is urged that 'The Korean conflict was a 'time of war' within the meaning of the insurance policy because, 1. Facts of common public knowledge of which this Court may take judicial notice, bring it within the definition of 'war'. 2. The term 'war' is plain and unambiguous.'

"(1, 2) It is manifest that the complaint did state a claim upon which the plaintiff might recover, this entirely aside from the question which counsel for the defendant propound in their summary of argument. By the policy the insurance company contracted to repay the premium paid in the event the insured died in the military service 'in time of war'. When the motion to dismiss was overruled, defendant's counsel declined to answer or plead further. The complaint did state a claim upon which plaintiff was entitled to recover and no other ruling was possible. The motion to dismiss raised no questions of fact, and since all factual matters, well pleaded, stand admitted at the time a motion to dismiss is presented, the ruling was proper. Had the defendant desired to raise issues of fact, an answer should have been

filed setting forth the insured was in the military service, and that his death occurred in time of war; that he had not received the Company's permission to engage in military service; had not paid the extra premiums required; the amount of the premiums actually paid on the policy and a tender of the amount thereof. None of these facts were before the trial court in the instant case. If the company desired to contest its liability in whole or in part it was incumbent on it to plead the facts on which it relies. If issue is joined in the matters set up as a total or partial defense, then trial must be had to determine the controverted matters. In the instant case no other course was open to the trial court than to enter judgment for plaintiff.

"(3, 4) We are asked to take judicial notice that the engagements of United States troops in Korea constituted 'War'; this, in spite of the fact, as counsel for defendant admit, that 'war' was never declared by Congress, the only authority competent to declare it, with respect to the action in Korea. The existence or nonexistence of a state of war is a political, not a judicial, question and it is only when a formal declaration of war had been made by the Congress that judicial cognizance may be taken thereof. Once so declared by the political department, it becomes binding upon the courts, otherwise not. *Rosenau v. Idaho Mut. Ben. Ass'n,* 65 Idaho 408, 145 P. 2d 227; *Beley v. Pennsylvania Mutual Life Ins. Co.,* 373 Pa. 231, 95 A. 2d 202, 36 A.L.R. 2d 996; *West v. Palmetto State Life Ins. Co.,* 202 S. C. 422, 25 S. E. 2d 475, 145 A.L.R. 1461.

"(5) The contract in the instant case was prepared by the officers and agents of the defendant

and as insurer it must stand by the words employed in the policy. If the words 'in time of war' were to include every type of hostility that might occur between the armed forces of different nations, without an open declaration of war, an insurer could not possibly know its liability under such a contract until some court decided whether or not the hostilities referred to constituted a 'war'.

"(6, 7) Any doubt concerning the meaning of a word or clause in a life insurance policy should be resolved in favor of the insured. Had the defendant desired to cover the contingency here involved it would have been a simple matter to include proper words to indicate that 'war' meant 'hostilities', whether or not declared by Congress to be a state of war.

"We perceive no error in the ruling of the trial court, hence the judgment is affirmed."

"APPENDIX 3"

War Risk Exclusion Provision of ordinary death benefit of subject life insurance policy.

"If the death of the Insured

(1) Results from injury received or disease contracted outside the Home Area as a result of war, while the Insured is in war service or within six months after termination of such service; or

(2) Results within two years from the date of issue of this policy, from injury received or disease contracted outside the Home Area while the Insured was in a civilian noncombatant occupation (including Red Cross, relief and morale improvement workers and war correspondents) associated with or accompanying the military, naval or air forces of any country or international organization, at war, declared or undeclared, provided death occurs while the Insured is outside the Home Area or within six months after return to the Home Area; or

(3) Results, directly or indirectly, from travel or flight in, or descent from, any kind of aircraft used anywhere for any purpose, but only if the Insured is a pilot, officer or member of the crew of such aircraft, or is giving or receiving any kind of training or instruction, or has any duties whatsoever aboard such aircraft while in flight, or is being transported between two points at least one of which is outside the Home Area; then

the amount payable to the beneficiary under this pol-

icy shall be a single sum equal to the premiums actually paid on this policy less any dividends returned, with compound interest at the rate of three per cent per annum, less any indebtedness on the policy; however, the amount so paid shall not be more than would be payable in the absence of this aviation and war risk provision, nor less than the valuation reserve on the life insurance benefit in this policy and on any dividend additions plus the value of any dividend deposits and less any indebtedness on the policy.

"'Home Area' means the forty-eight states of the United States, the District of Columbia, the Dominion of Canada, the Territory of Hawaii and the Territory of Alaska. 'War' means war, or any act of war, declared or undeclared. 'War service' means being in the military, naval or air forces of any country, or international organization, at war, declared or undeclared.

"This provison shall be included in any policy to which this policy may be changed or converted.

"This provision shall not affect or modify the terms of any Double Indemnity or Disability Benefits which may be included in this policy."

Double Indemnity Benefit of subject life insurance policy:

"This Double Indemnity Benefit shall not apply if the Insured's death

(1) occurs while in the military, naval, or air forces of any country at war, declared or undeclared; or

(2) is caused or contributed to by war."